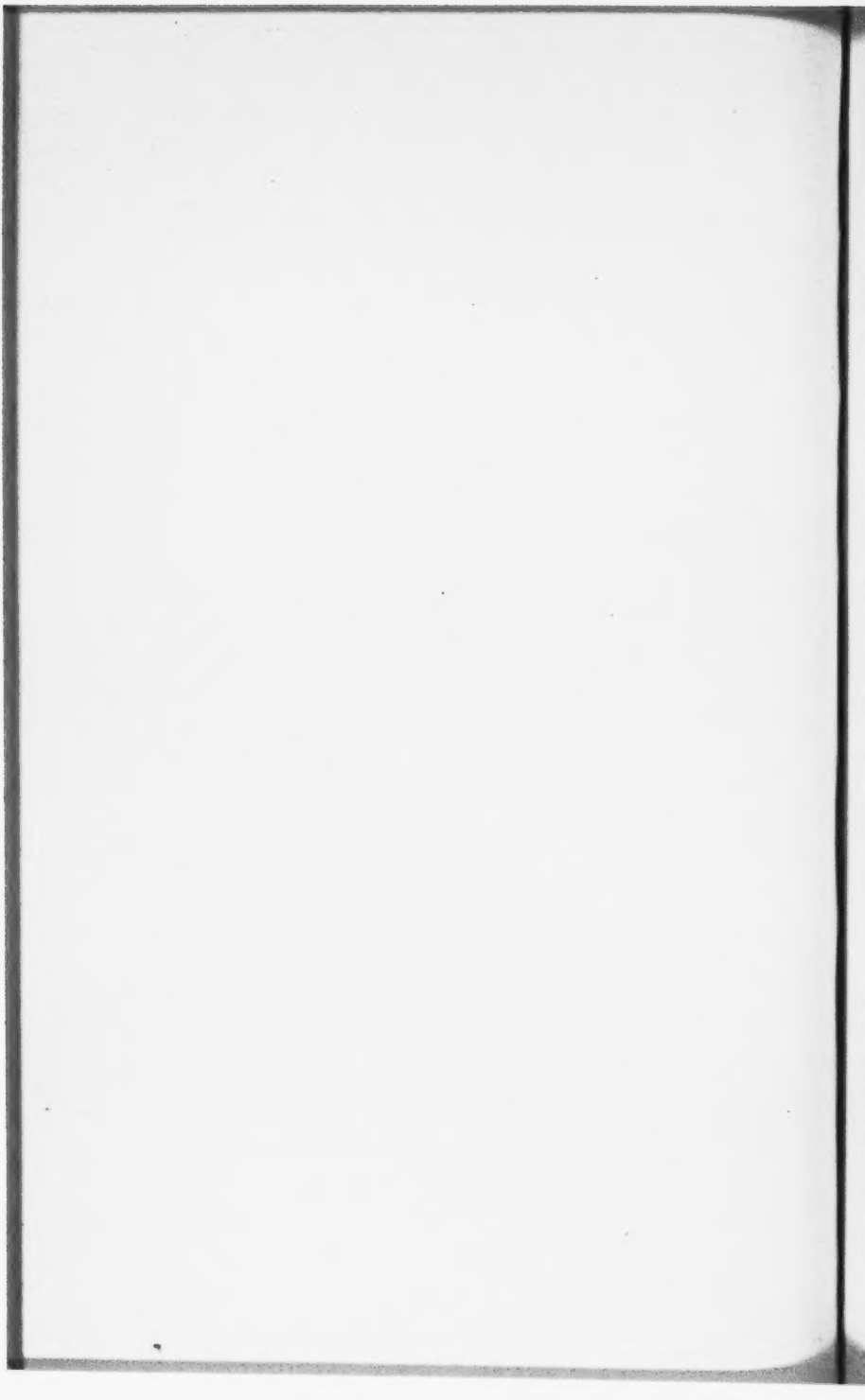
INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	4
Argument	6
Conclusion	9

CITATIONS

Cases:	
Campau v. *City of Detroit*, 225 Mich. 519	7, 8
Cleaver v. *Board of Education*, 263 Mich. 301	8
Deputy v. *du Pont*, 308 U. S. 488	8
Kieselbach v. *Commissioner*, 317 U. S. 399	6, 7, 8
Morgan v. *City of Detroit*, 251 Mich. 63	7
Old Colony R. Co. v. *Commissioner*, 284 U. S. 552	8
Statutes:	
Michigan Compiled Laws (1929), Sec. 14555	6, 7
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Sec. 22	2
Sec. 111	2
Sec. 117	3
Miscellaneous:	
Detroit City Charter:	
Title VIII, c. 1, Sec. 8	7
Title VIII, c. 1, Sec. 16	7



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 370

EDITH HENRY BARBOUR, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 12–18) is reported in 44 B. T. A. 1117. The opinion of the Circuit Court of Appeals (R. 32–33) is reported in 136 F. 2d 486.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 22, 1943 (R. 31). The petition for a writ of certiorari was filed September 21, 1943. The jurisdiction of this Court is invoked

under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the interest paid on a judgment confirming a condemnation award was taxable as ordinary income under Section 22 (a) of the Revenue Act of 1936 rather than as capital gain under Section 117 (a) of the Revenue Act of 1936.

STATUTES INVOLVED

Revenue Act of 1936, c. 690, 49 Stat. 1648:

> SEC 22. GROSS INCOME.
>
> (a) *General definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * * * *
>
> SEC. 111. DETERMINATION OF AMOUNT OF, AND RECOGNITION OF, GAIN OR LOSS.
>
> (a) *Computation of gain or loss.*—The gain from the sale or other disposition of property shall be the excess of the amount

realized therefrom over the adjusted basis provided in section 113 (b) for determining gain, and the loss shall be the excess of the adjusted basis provided in such section for determining loss over the amount realized.

(b) *Amount realized.*—The amount realized from the sale or other disposition of property shall be the sum of any money received plus the fair market value of the property (other than money) received.

* * * * *

SEC. 117. CAPITAL GAINS AND LOSSES.

(a) *General Rule.*—In the case of a taxpayer, other than a corporation, only the following percentages of the gain or loss recognized upon the sale or exchange of a capital asset shall be taken into account in computing net income:

100 per centum if the capital asset has been held for not more than 1 year;

80 per centum if the capital asset has been held for more than 1 year but not for more than 2 years;

60 per centum if the capital asset has been held for more than 2 years but not for more than 5 years;

40 per centum if the capital asset has been held for more than 5 years but not for more than 10 years;

30 per centum if the capital asset has been held for more than 10 years.

* * * * *

(Pertinent local laws are set forth in the Appendix to the petition.)

STATEMENT

In 1922 taxpayer inherited an undivided one-half interest in three parcels of real estate fronting on Woodward Avenue in the City of Detroit, Michigan. The three buildings located on this property were thereafter used in taxpayer's trade or business. (R. 12–13.)

In July 1927, following approval by the Detroit voters of a plan for widening Woodward Avenue, the city's common council passed a resolution declaring a necessity for the improvement, conditioning the resolution, however, upon the signing of financing agreements by at least 75% of the owners of the property to be affected. Such agreements were necessary because of the city's inability to comply with the provisions of its charter and of the Michigan statutes requiring condemned property to be paid for within one year after confirmation of the condemnation award and prohibiting the taking of possession until such payment has been made. The requisite number of property owners signed the agreements, although taxpayer and her joint owner did not. (R. 13.)

Pursuant to the condemnation provisions of its charter, the city filed a petition with the recorder's court on November 17, 1927, setting forth that the city had declared the public necessity for widening Woodward Avenue and alleging that the accomplishment of this purpose necessitated the

condemnation of certain property, including 20 feet of the three parcels of real estate in which taxpayer was a joint owner. The proceedings thus instituted were eventually brought to trial, and on February 16, 1932, the jury delivered a written verdict, finding the taking of the specified portions of the three parcels necessary and awarding compensation therefor. The sum of $180,935.90 was fixed for the condemned portion of one of the parcels occupied by one of the three buildings. On July 21, 1932, the recorder's court entered a judgment confirming this verdict. (R. 13.)

On November 26, 1937, the city paid taxpayer and her joint owner the specified sum of $180,935.90. On the date this award was paid, taxpayer's share of this amount exceeded her portion of the cost basis of the land and building in respect of which the award was paid. (R. 13–14.)

The judgment award for the condemned portions of the other two parcels had not been paid on the date of the hearing before the Board, and possession of none of the condemned portions of the three parcels had been taken at that time. During the years 1932 to 1937, inclusive, taxpayer received and retained her one-half share of the rentals of the entire three buildings. In 1933, the assessments on the three properties were adjusted in such a manner as to free the condemned portions from city tax. (R. 14.)

On December 21, 1937, the city paid to taxpayer and her joint owner the further sum of $48,345.97, being interest upon the award of $180,935.90, from July 21, 1932, the date on which the award was confirmed, to December 21, 1937, at the rate of 5% per annum, as prescribed by Section 14555, Michigan Compiled Laws (1929) (R. 14).

On her 1937 return taxpayer reported her one-half share of the $48,345.97 interest ($24,172.98) as ordinary income, taxable in full. The Commissioner asserted a deficiency as to other items, not material here (R. 6–9), and the taxpayer petitioned the Board of Tax Appeals claiming overpayment and contending that the $24,172.98 was taxable as capital gain rather than as ordinary income. (R. 13.) The Board sustained her contention (R. 17), and determined that there was an overpayment of income tax for 1937 in the amount of $3,885.81 (R. 18), instead of a deficiency of $816.11 as determined by the Commissioner (R. 6, 12). The court below reversed (R. 31).

ARGUMENT

The decision below is in accord with *Kieselbach* v. *Commissioner,* 317 U. S. 399. The facts here differ from those in the *Kieselbach* case in but two particulars: (1) In the *Kieselbach* case, the portion of the award computed as interest was not paid as interest; New York law required such interest to be paid "as part of the compensation" (317 U. S. at p. 401). Here, the interest was

paid not as a part of, but in addition to, the "compensation" for the property. The latter was established by the jury's verdict, pursuant to the Detroit City Charter, Title VIII, c. 1, Sec. 8 (Pet. 13), as confirmed by the judgment of the recorder's court. The interest was paid on the judgment pursuant to a general statute—Compiled Michigan Laws (1929), Section 14555 (Pet. 16)—providing for interest at five percent on judgments and decrees. See *Campau* v. *City of Detroit,* 225 Mich. 519; *Morgan* v. *City of Detroit,* 251 Mich. 63.[1] This factual difference between the two cases obviously favors the Commissioner, not the taxpayer.

(2) In the *Kieselbach* case, the City of New York acquired title and took possession of the condemned property prior to payment of the condemnation award. Here, the City of Detroit, under Title VIII, c. 1, Section 16 of its charter (Pet. 14–15), could not acquire possession, or perhaps title, until the condemnation award was paid or the payment secured. On this basis, the taxpayer attempts to distinguish the cases, arguing (Pet. 7–8) that here the "sale" did not take place until payment was made, and that the aggregate sums paid in 1937 constituted the sale price. But

[1] In the *Morgan* case the Supreme Court of Michigan said (251 Mich. at p. 65):

> The judgment in condemnation draws interest because it is a judgment, and because the statute provides that judgments draw interest.

the fallacy of this is the assumption that the sale price was not, and could not be, determined prior to payment. In fact, the "sale" here became binding as of the time the condemnation award was confirmed by court decree. *Campau* v. *City of Detroit, supra.*[2] "The rights of the parties were concluded by confirmation of judgment, both as to amount of award and the premises taken." *Cleaver* v. *Board of Education,* 263 Mich. 301, 305. Due to the delay in payment, the taxpayer became entitled to interest on the judgment, but this clearly was "indemnification for delay, not a part of the sale price" (*Kieselbach* v. *Commissioner,* 317 U. S. at p. 404), which was unalterably fixed. Payment of the additional amount was required simply "for the use or forebearance of money" (*Deputy* v. *du Pont,* 308 U. S. 488, 498). Cf. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552,

[2] In analyzing the effect of the judicial confirmation of the condemnation award the court said (p. 524):

> It amounts to a present forced sale of the property at the then cash value awarded, giving the purchaser, however, on or before a year from date in which to pay for it.

The court also stated (p. 531):

> When judgment was entered upon the award and no appeal taken, the rights and obligations of the parties were legally adjudicated and fully fixed. The amount of defendant's indebtedness for the land it compelled plaintiff to sell was as finally and forcibly determined as by any other judgment. Its absolute right and title to the property only awaited payment of a judgment, based on just compensation for the property at the time it was rendered.

560–561. Hence, it was not only designated "interest" but was interest. And the situation is not changed by the fact that the taxpayer obtained what is seemingly a windfall in collecting rents from the date of the award to the date of payment (*supra*, p. 5).

CONCLUSION

The decision of the court below is correct. There is no conflict. The petition should be denied.

Respectfully submitted,

CHARLES FAHY,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
J. LOUIS MONARCH,
JOSEPH M. JONES,
Special Assistants to the Attorney General.

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